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CHIN KIM PHIN v. DIRECTOR OF LANDS & SURVEYS, SABAH & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
WONG SIONG TUNG JC
[ORIGINATING SUMMONS NO: BKI-24-66-7-2019]
27 FEBRUARY 2020

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LAND LAW: *Lease – Tenure – Reduction of leasehold tenure from 999 years to 99 years – Departments of Lands and Surveys imposed condition for reduction of leasehold tenure for issuance of subdivided titles – Whether allowed in application for land development – Whether Department of Lands and Surveys seized with power to impose such condition – Whether condition or term valid and binding by law of contract – Whether condition ultra vires, unlawful, null and void – Whether action time-barred by s. 2(a) of Public Authorities Protection Act 1948*

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In 1923, the predecessor of the State Government of Sabah, the British North Borneo Company, had granted a leasehold of the parcel of land ('original title') to one Lin Fook for the term of 999 years, from 1920. The plaintiff acquired the parcel of land under the original title as the owner, in 1963, after the Land Ordinance (Sabah) (Cap 68) came into force. In 1974, upon the plaintiff's application for subdivision, the parcel of land under the original

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title was subdivided into three subdivided lots with three separate documents of title ('subdivided titles') issued to the plaintiff with the same leasehold tenure of 999 years, from 1920 to 2919. The plaintiff then entered into an arrangement with one Donfon Development Sdn Bhd ('Donfon') for the development of the parcels of land under the subdivided titles, together with

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six other parcels of land. In 2002, Donfon applied for the development of three parcels under the subdivided titles together with the other six parcels of land. The proposed plan, approved by Dewan Bandaraya Kota Kinabalu, involved the amalgamation of the three parcels of land under the subdivided titles with the other six parcels of lands and the further subdivision of the

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amalgamated lot thereof, into 16 subdivided lots. Based on the proposed plan, Donfon applied to the Lands and Surveys Department for subdivision of the nine parcels of land and for conversion in their use. The first defendant offered upon conversion/subdivision/amalgamation of nine parcels of land concerned, to lease to the registered owners, the 16 subdivided lots subject

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to the conditions that, *inter alia*, (i) the surrender of the original titles for the nine parcels of land including the subdivided titles; and (ii) that the tenure for the lease in respect of the subdivided lots shall be from 2004 to 2102 (reduced from 999 years to 99 years) ('conditions'). Both Donfon and the plaintiff accepted the first defendant's offer and terms. The first defendant issued to the plaintiff five further subdivided titles derived from the

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subdivided titles ('further subdivided titles') with a leasehold tenure of only 99 years from 2004 to 2102. More than 14 years later, the plaintiff

commenced the instant action for declarations that (i) the conditions imposed by the first defendant were *ultra vires*, unlawful and invalid; (ii) the subdivided lots be restored to the leasehold tenure of 999 years with effect from 1920 as existed before the subdivision of three parcels of land; and (iii) the first and second defendants shall give full and complete effect to the declarations. In support of the application, the plaintiff argued that, *inter alia*, (i) the first defendant had no legal power to impose the condition. Therefore, such condition was *ultra vires*, unlawful, null and void; and (ii) as the plaintiff's action was for a declaration that such act of the first defendant in imposing the condition was *ultra vires*, unlawful, null and void, it was not barred by any time limitation. The issues that arose for adjudication were (i) whether, in the application for land development involving the subdivision, amalgamation and conversion in the use of the land, the defendants have the power to impose the condition that leasehold tenure for the further subdivided titles to be issued be reduced from 999 years to 99 years; and (ii) whether the plaintiff's action was time-barred by s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA').

Held (granting order for declarations):

(1) The condition imposed by the first defendant, that leasehold tenure for the further subdivided titles to be issued be reduced from 999 years to 99 years, was not connected or related to the use of the land in town planning and could not fairly be said to be related to the permitted land development under the laws in the State of Sabah and, therefore, beyond the power of the defendants to impose. In the instant case, the condition for the leasehold tenure to be reduced from 999 years to 99 years, in respect of the issuance of the further subdivided titles to the plaintiff was imposed by the first defendant as term proposed in an offer for giving permission to develop the land which the plaintiff had accepted. The question was whether such condition or term was rendered valid and binding on the plaintiff by the law of contract. There are no statutory provisions that gave them the power or capacity to impose such condition in the form and by way of term or condition proposed or offered to contract with the defendant in an application for permission by the plaintiff for the development of the land concerned. (paras 66, 67 & 69)

(2) The fact that such term and condition was imposed in the form of term or condition proposed or offered to contract by the first defendant and accepted by the plaintiff, did not change the position and gave the power to the defendants to impose such term and condition which was beyond the power and capacity of the defendants to impose at the first place. The condition imposed by the defendant, that the leasehold tenure for the further subdivided titles to be issued be reduced from 999 years to 99 years in the plaintiff's application for permission for the development of the land concerned was *ultra vires*, unlawful, null and void. (paras 70 & 72)

(3) In order to afford the defendants protection under s. 2(a) of the PAPA, the defendants have to bring themselves within the scope of the provision therein providing them with the protection, that is the action or suit must be against any person: (i) for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority; or (ii) for neglect of default in the execution of any such written law, duty or authority. The act complained of against the defendants was for imposing the term and conditions that leasehold tenure for the further subdivided titles to be issued be reduced from 999 years to 99 years for giving permission to the plaintiff for the proposed development plan on the land concerned which the defendants had no such power to impose. The imposing of such term and condition which the defendants had no power to do so cannot be said to be such act done in pursuance of a public duty or authority. Therefore, it could not have come within the provisions of s. 2(a) of the PAPA. (paras 74, 77 & 78)

Case(s) referred to:

Ban Guan Hin Realty Sdn Bhd v. Sunny Yap Chiok Sai & Ors [1987] 1 LNS 144 HC ***(refd)***

Chertsey UDC v. Mixnam's Properties, Ltd [1964] 2 All ER 627 ***(refd)***

Colonial Sugar Refining Co v. Melbourne Trust Commissioners [1927] AC 343 ***(refd)***

Fawcett Properties Ltd v. Buckingham County Council [1960] 3 All ER 50 ***(refd)***

Government Of The Federation Of Malaya v. Surinder Singh Kanda [1960] 1 LNS 30 HC ***(refd)***

Hall & Co Ltd v. Shoreham-by-Sea UDC [1964] 1 All ER 1 ***(refd)***

Lee Hock Ning v. Government Of Malaysia [1972] 1 LNS 66 FC ***(refd)***

Leo Leslie Armstrong (Sebagai Presiden Dan Pemegang Jawatan The Young Men's Christian Association Of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (Yang Dahulunya Di Pegang Oleh Majlis Mesyuarat Kerajaan Negeri Selangor) [2015] 2 CLJ 10 CA ***(foll)***

Madeli Salleh v. Superintendent Of Lands And Surveys & Anor [2005] 3 CLJ 697 CA ***(refd)***

Ngo Ong Chung & Ors v. Pengarah Tanah Dan Galian Perak Darul Ridzuan [2013] 1 LNS 146 HC ***(foll)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Pyx Granite Co Ltd v. Ministry of Housing and Local Government [1958] 1 All ER 625 ***(refd)***

Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Legislation referred to:

Interpretation and General Clauses Enactment, 1963, ss. 2, 6, 14(2)(c)

Land Ordinance (Amendment) 1913, s. 43A

Land Ordinance (Sabah) (Cap 68), ss. 3, 39, 40, 47, 48, 54

National Land Code, s. 124(5)

Public Authorities Protection Act 1948, s. 2(a)
Town and Country Planning Ordinance (Sabah) (Cap 141), ss. 4A, 4B(1)(a), 6(1)(b), (c), 7, 8, 9, 10(1), (5), (6), 11(1), (2), 28B, 28C, 28D

For the petitioner - Kong Hong Ming; M/s Lee & Kong
For the respondent - Nurul Ezza Mausar

Reported by Najib Tamby

JUDGMENT

Wong Siong Tung JC:

The Plaintiff's Claims

[1] By this originating summons (encl. 1), the plaintiff is seeking for the following declarations:

(i) that the condition imposed by the first defendant to surrender the original title for three parcels of land, namely, in CL015354266, CL015354319 and CL015354328 each with leasehold tenure of 999 years in exchange for a reduced leasehold tenure of 99 years for the subdivided lots derived therefrom, namely and now held under document of title No. CL015605991; CL015606005 (derived from CL015354266), CL015606069; CL015606050 (derived from CL015354319); and including CL015606041 (derived from CL015354328) as a condition for the approval of the subdivision of the three parcels of land, namely, CL015354266, CL015354319 and CL015354328 was *ultra vires* and unlawful and was therefore invalid;

(ii) that these subdivided lots namely and now held under CL015605991; CL015606005, CL015606069; CL015606050; and including CL015606041 be restored to the leasehold tenure of 999 years with effect from 13 October 1920 as existed before the subdivision of three parcels of land, namely, in CL015354266, CL015354319 and CL015354328; and

(iii) the first defendant and the second defendant shall give full and complete effect to the declarations.

[2] To support his application, the plaintiff filed his affidavit in support affirmed herein on 31 July 2019 (encl. 2).

[3] The defendants filed the affidavit in opposition of Sernam Singh affirmed herein on 5 September 2019 (encl. 3) to oppose the plaintiff's application.

Brief Background

[4] On 28 May 1923, the predecessor of the State Government of Sabah, the British North Borneo Company then, by a deed, granted a leasehold of the parcel of land under Lease No. CL1632 (also known as CL015016323) (hereinafter referred to as "the original title") to Lin Fook for the term 999

years from 13 October 1920. The original title in the form of a deed was registered in the District of Jesselton.

[5] In 1963, the plaintiff acquired the parcel of land under the original title and registered as the owner on 29 August 1963, after the Land Ordinance (Sabah Cap. 68) came into force.

[6] Sometime in 1974, upon the plaintiff's application for subdivision, the parcel of land under the original title was subdivided into three subdivided lots with three separate documents of title namely, CL015354266, CL015354319 and CL015354328 (hereinafter referred to as "the subdivided titles") issued to the plaintiff with the same leasehold tenure of 999 years from 13 October 1920 to 12 October 2919.

[7] It seems that the plaintiff had entered into some kind of arrangement with one Donfon Development Sdn Bhd (hereinafter referred to as "Donfon") for the development of the parcels of land under the subdivided titles (see exh. SS4 of encl. 3) together with six other parcels of land.

[8] Sometime in 2002, Donfon applied for development of the three parcels of land under the subdivided titles together with the other six parcels of land, namely under titles CL015354257, 015354275, 015354284, 015354293, 015354300, and 015410072 for construction of 16 units of two-storey semi-detached house thereon.

[9] On 27 April 2002, Dewan Bandaraya Kota Kinabalu approved Donfon's proposed plan (see exh. SS3 of encl. 3)

[10] Donfon's proposed development plan approved by Dewan Bandaraya Kota Kinabalu involved the amalgamation of the three parcels of land under the subdivided titles with the other six parcels of land under CL015354257, 015354275, 015354284, 015354293, 015354300, and 015410072 and the further subdivision of the amalgamated lot thereof, into 16 subdivided lots for the construction of the 16 units of two-storey semi detached house thereon and part of the land for road reserve, SESB substation reserve and open space.

[11] It seems that it was based on Donfon's proposed plan approved by Dewan Bandaraya Kota Kinabalu that Donfon applied to the Lands and Surveys Department for subdivision of the nine parcels of land and for conversion in their use for the 16 units of two-storey semi detached house to be constructed. (see exh. SS4 of encl. 3).

[12] By a letter dated 28 April 2004, the first defendant offered upon conversion/subdivision/amalgamation of the nine parcels of land concerned, to lease to the registered owners thereof, the 16 subdivided lots (as described in the schedule therein) subject to the provision and conditions which I will not set out except the following conditions that concerned the plaintiff's application in this action:

(i) the surrender of the original titles for the nine parcels of land including the subdivided titles (ie CL015354257, 015354266, 015354275, 015354284, 015354293, 015354300, 015354319, 015354328 and 015410072); and

(ii) that the tenure for the lease in respect of the subdivided lots shall be from 1 January 2004 to 31 December 2102 (reduced from 999 years to 99 years)

(see exh. SS7 of encl. 3).

[13] Both Donfon and the plaintiff signed the said letter of the first defendant to signify acceptance of the offer and the terms therein.

[14] Following the acceptance of the offer by Donfon and the plaintiff, on 28 March 2005, the first defendant issued to the plaintiff, five further subdivided titles CL015605991, CL15606005, CL015606069, CL015606050 and CL015606041 derived from the subdivided titles (hereinafter referred to as "the further subdivided titles") with a leasehold tenure of only 99 years from 1 January 2004 to 31 December 2102.

[15] More than 14 years later, the plaintiff took out the instant action for the declarations sought for herein.

The Plaintiff's Contentions

[16] The plaintiff's counsel submitted that s. 40 of the Land Ordinance (Sabah Cap. 68) is a special provision for subdivision of alienated or titled land and it imposed a duty on the first defendant upon application for subdivision, to accept the surrender of the subdivided titles and to issue new leases or make new titles for the further subdivided titles "on the terms of" the subdivided titles subject only to the imposition of additional premium and the rent payable to the State Government.

[17] Thus, the plaintiff's counsel contended that the first defendant has no legal power to impose the condition that the plaintiff surrendered the leasehold tenure of 999 years under the subdivided titles to a reduced leasehold tenure of 99 years for the further subdivided titles issued. Therefore, the plaintiff's counsel submitted that such condition as imposed was *ultra vires*, unlawful, null and void.

[18] The plaintiff's counsel also contended that as the plaintiff's action is for declaration that such act of the first defendant in imposing the condition that the leasehold tenure for the further subdivided titles be reduced to 99 years was *ultra vires*, unlawful, null and void, it is not barred by any time limitation.

[19] The plaintiff's counsel relied on the decisions of the Federal Court in the case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135, of the Court of Appeal in *Leo Leslie Armstrong (Sebagai Presiden Dan Pemegang Jawatan The Young Men's Christian Association Of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (Yang Dahulunya Di Pegang Oleh Majlis Mesyuarat Kerajaan Negeri Selangor)* [2015] 2 CLJ 10; [2015] 1 MLJ 255 and of the High Court in *Ngo Ong Chung & Ors v. Pengarah Tanah Dan Galian Perak Darul Ridzuan* [2013] 1 LNS 146; [2013] 10 MLJ 879.

The Defendants' Contentions

[20] The Sabah State counsel on behalf of the defendants submitted that the original title was issued under Part II of the Land Ordinance (Amendment) 1913 and subject to s. 43A thereunder, to be for agricultural purposes.

[21] The State counsel submitted that in 1930, the Land Ordinance (Amendment) 1913 was repealed and replaced by Land Ordinance (Sabah Cap. 68).

[22] She contended that the saving provision contained in s. 3 of Land Ordinance (Sabah Cap. 68) do not prevent the application of the provisions therein relating to land tenure as s. 3 stated that validity or invalidity of anything done or suffered or of any right, title or interest created under the operation of the previous law is preserved "except" specially otherwise enacted.

[23] She submitted that the second application of the plaintiff for further subdivision of the land under the subdivided titles was not merely for their subdivision but their amalgamation with six other titles which belonged to a third party. It also involved a change in the permitted use of the land (from agricultural use to residential use for the 16 units of two-storey semi-detached house to be constructed) which required approval of the relevant Minister under s. 54 of the Land Ordinance (Sabah Cap. 68).

[24] She contended that s. 54 of the Land Ordinance (Sabah Cap. 68) empowered the relevant Minister while giving his approval to application to change from agricultural use, to reduce leasehold tenure for the further subdivided titles from 999 years to 99 years under s. 48 of the Land Ordinance (Sabah Cap. 68).

[25] The State counsel submitted that ss. 3, 40, 48 and 54 of the Land Ordinance (Sabah Cap. 68) were applicable and read together gave the power to the defendants to impose the condition to change the leasehold tenure by reducing it to 99 years upon change of the use of the land from agricultural purposes to that of the proposed development plan as applied for by the plaintiff.

[26] The Sabah State counsel also submitted that the plaintiff's action herein is barred by s. 2(a) of the Public Authorities Protection Act 1948 ("PAPA") as it was instituted more than 36 months after the "act, neglect or default complained of" that is the date of the issuance of the new leases under the further subdivided titles in 2004.

The Issues For Determination By The Court

[27] The issues for determination of the court are:

(i) whether in the application for the land development involving the subdivision, amalgamation and conversion in the use of the land, the defendants have the power to impose the condition that leasehold tenure for the further subdivided titles to be issued be reduced from 999 years to 99 years; and

(ii) whether the plaintiff's action herein is time-barred by s. 2(a) of the PAPA 1948 (PAPA).

Analysis Of The Relevant Provisions Of The Land Ordinance (Sabah Cap. 68)

[28] To begin with, the Land Ordinance (Sabah Cap. 68) came into force on 13 December 1930. It has no repeal provision, that expressly repealed the laws relating to land tenure operational before, including those laws under the Proclamations and 1913 Land Laws made when government was by British North Borneo Company.

[29] Before the Land Ordinance (Sabah Cap. 68) came into force, the predecessor-in-title of the plaintiff had acquired the leasehold of the parcel of land under the original title with a tenure 999 years from 13 October 1920 to 12 October 2919 by the laws prior to the coming into force of Land Ordinance (Sabah Cap. 68). The plaintiff acquired the parcel of land under the original title in 1963 and the subdivided titles with the same 999 years tenure were derived therefrom upon subdivision in 1974.

[30] The s. 3 of the saving provision of Land Ordinance (Sabah Cap. 68) provides that:

> 3. Saving.
>
> Nothing **except as herein specially otherwise enacted** shall affect the past operation of any written law relating to land tenure heretofore in force in the Mainland or in Labuan or of any order made or the validity or invalidity of anything done or suffered or of any right, title or interest created thereunder. (emphasis added)

[31] From s. 3 of the Land Ordinance (Sabah Cap. 68), the result is that if prior to the coming into force of Land Ordinance (Sabah Cap. 68), rights had been acquired or accrued and liabilities had been incurred by the past operation of any written law relating to land, they would not be affected by Land Ordinance (Sabah Cap. 68) unless it is specially enacted otherwise.

[32] The use of the word "specially" in s. 3 of the Land Ordinance (Sabah Cap. 68), must intended to mean not ordinarily or generally, but meaning particularly, notably, expressly, specifically or exclusively.

[33] Even if the contention of the learned State counsel is correct that the law under Land Ordinance (Amendment) 1913 was repealed and replaced by the Land Ordinance (Sabah Cap. 68) which I must say that I do not agree to the whole extent, s. 14(2)(c) of the Interpretation and General Clauses Enactment 1963 (Sabah 34 of 1963) (applicable by virtue of s. 2 therein) provides that:

> **Effect of repeal**
>
> 14. (1) ...
>
> (2) Where any written law repeals in whole or in part any State law, then, unless the contrary intention appears, such repeal shall not:
>
> (a) ...
>
> (b) ...
>
> (c) **affect any right, privilege, obligation or liability acquired, accrued or incurred under any State law so repealed**; (emphasis added)
>
> ...

[34] In *Colonial Sugar Refining Co v. Melbourne Trust Commissioners* [1927] AC 343 at p. 359, Lord Warrington of Clyffe of the Privy Council held that in considering the construction and effect of a statute, the court is to be guided by the well known principle that "a statute should not be held to take away private rights of property without compensation unless the intention to do so is **expressed in clear and unambiguous terms**." (emphasis added)

See also *Madeli Salleh v. Superintendent Of Lands And Surveys & Anor* [2005] 3 CLJ 697; [2005] 5 MLJ 305 (CA) affirmed by Federal Court in *Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509; [2008] 2 MLJ 677.

[35] I have to consider whether there are any legal provisions "specially enacted" or expressed an intention in clear and unambiguous terms in empowering the defendants to impose the condition for the original tenure of the leasehold granted to be reduced in the issuance of the derivative subdivided titles therefrom, in granting permission to any proposed development plan thereon involving amalgamation/subdivision/change in the use of the land applied for by the landowners.

[36] For amalgamation of land, s. 39 of the Land Ordinance (Sabah Cap. 68) provides that:

39. Combination of titles

In the absence of an express condition to the contrary in the document of title any owner of two or more contiguous lots may, subject to the provisions of any written law for the time being in force **relating to Town Planning or governing the size, shape or area of land to be held under any single title,** combine the same in one lot, and the title to such one lot shall be subject to such of the conditions set forth in the documents of title to the several lots as **the Director may select.** (emphasis added)

[37] In respect of subdivision of titles, s. 40 of the Land Ordinance (Sabah Cap. 68) provides that:

40. Sub-division of titles

(1) If the owner of any land comprised in any document of title is desirous of dividing or partitioning such land, application shall be made to **the Collector** to accept a surrender of such title and to issue new leases or make new entries in the Register relating to the land comprised therein in such lots **as the owner may desire. The Collector** shall thereupon *in lieu* thereof and **subject to the provisions** of any written law for the time being in force relating to Town Planning or governing the size, shape or area of land to be held under any single title, issue such titles as may be required, on the terms of the original title:

Provided that all arrears of rent and charges, if any, due under the original title shall have been satisfied:

And provided further that the Director shall impose additional premium and that the rent payable to the Government in respect of each of such sub-divisions and shall enter such amounts on the new titles and also impose special conditions in respect thereof to be set out in the titles.

The rent, if any, reserved on each parcel shall not be less than fifty sen in the case of a lease or twenty sen in the case of a Native Title.

(2) When land is held by co-proprietors, any one of them may claim to have a partition of the land made:

Provided that if the land be subject to a charge or sublease no partition shall be made unless the chargee or lessee as the case may be shall have given his consent to such partition.

(3) In the absence of agreement between the parties the question of partition shall be decided, in the case of Native Titles by the Native Court, and in other cases by **the Collector** in accordance with rules hereunder. (emphasis added)

[38] I read the phrase "subject to the provisions of any written law for the time being in force relating to town planning or governing the size, shape or area of land to be held under any single title" as meaning to be consistent with or fulfilling any requirements of or not being excluded by or within the limitation of any written law in force relating to town planning or governing the size, shape or area of land to be held under any single title (see *Government Of The Federation Of Malaya v. Surinder Singh Kanda* [1960] 1 LNS 30; [1961] 1 MLJ 121).

[39] For completeness sake, though the power under s. 39 of the Land Ordinance (Sabah Cap. 68) is vested upon the Director and whereas the power under s. 40 of the Land Ordinance (Sabah Cap. 68) is vested with the Collector, under s. 47 of the Land Ordinance (Sabah Cap. 68), the Director may exercises the powers vested in a Collector.

[40] I am of the view that the power conferred whether on the Director or the Collector under ss. 39 and 40 respectively of the Land Ordinance (Cap. 68) to impose conditions in issuance of the amalgamated or subdivided titles thereunder is controlled by the words "relating to town planning or governing the size, shape or area of land" as appeared in these sections. In other words, the conditions imposed must be fairly related to or connected or to do with town planning or governing the size, shape or area of land.

[41] In respect of s. 48 of the Land Ordinance (Sabah Cap. 68), it provides that:

> **48. Form of lease**
>
> Subject to any special exceptions made by the Minister in particular cases **every lease under this part** shall be substantially in the form of Schedule VIII, and shall be for a term not exceeding ninety-nine years.
>
> (emphasis added)

[42] The provision in s. 48 of the Land Ordinance (Sabah Cap. 68) cannot be fairly and naturally construed or read as to apply to s. 39 of the Land Ordinance (Sabah Cap. 68) concerning combined or amalgamated title and/or to s. 40 of the Land Ordinance (Sabah Cap. 68) concerning subdivision of titles and application thereunder, which are all under Part I.

[43] I cannot ignore the fact that s. 39 and s. 40 on one hand and s. 48 on the other hand are under different parts of the Land Ordinance (Sabah Cap. 68). Section 6 of the Interpretation and General Clauses Enactment 1963 (Sabah 34 of 1963) requires the court to take notice of the divisions which the section provides as follows:

Subdivision of Enactments

6. Where an Enactment is divided into parts, chapters, titles or other subdivisions, the fact and particulars of such division shall, with or without express mention thereof in such Enactment, be taken notice of in all courts and for all purposes whatsoever.

[44] I also do not find the provision in s. 48 of the Land Ordinance (Sabah Cap. 68) expresses a clear and unambiguous intention to confer power on the Minister or the defendants to expropriate the vested right of the plaintiff to an estate of 999 years for the leasehold tenure under the subdivided titles acquired under the laws in operation prior to the coming into force of the Land Ordinance (Sabah Cap. 68). Such an interpretation would be inconsistent and repugnant to the provisions in ss. 3, 39 and 40 of the Land Ordinance (Sabah Cap. 68).

[45] For s. 48 of the Land Ordinance (Sabah Cap. 68) to operate harmoniously and consistently with ss. 3, 39 and 40 of the Land Ordinance (Sabah Cap. 68), I am of the view that the provision under s. 48 of the Land Ordinance (Sabah Cap. 68) can only apply to new lease for country land newly alienated under Part II of the Land Ordinance (Sabah Cap. 68) and not applicable to any titles issued upon combination or amalgamation and subdivision from existing titles under ss. 39 and 40 under Part I of the Land Ordinance (Sabah Cap. 68).

[46] The land by the leasehold under the original title granted to the predecessor-in-title of the plaintiff and acquired by the plaintiff and subdivided under the subdivided titles were indeed stated to be for agricultural purposes. For such land alienated for agricultural purposes, s. 43A of the Land Ordinance (Amendment) 1913, empowered the Governor then to permit their use other than for agricultural purposes and "to add or substitute such terms as he may think fit."

[47] Section 54 of the Land Ordinance (Sabah Cap. 68) in effect substituted "the Governor" in s. 43A of the Land Ordinance (Amendment) 1913 with "the Minister" which reads as follows:

54. Land to be used for agricultural purposes only

Land which has been alienated under this Part or under similar part of any previous Land Ordinance shall not be used for other than agricultural purposes except with permission of the Minister who may impose additional premium or rent or add or substitute **such terms and conditions** as he may think fit. (emphasis added)

[48] Though on the face of s. 54 of the Land Ordinance (Sabah Cap. 68), it seems to give the Minister wide power to "add or substitute such terms and conditions as he may think fit" in permitting for such land to be used for purpose other than agricultural purposes.

[49] However, applying the principle of law as propounded by the Privy Council in *Colonial Sugar Refining Co v. Melbourne Trust Commissioners* (*supra*) at p. 359, the general wordings in s. 54 of the Land Ordinance (Sabah Cap. 68) could not be construed as entitling the Minister and/or the defendants to impose terms and conditions so as to deprive the vested right of the plaintiff to an estate of 999 years leasehold tenure under the subdivided titles acquired before the coming into force of the Land Ordinance (Sabah Cap. 68).

[50] If the Legislature has intended that the Minister and/or the defendants should be conferred with the power to impose the terms and conditions that the duration of the estate under any leasehold may be reduced or shortened in giving permission for the change in the use of land designated for agricultural purposes, it would have no difficulty in using clear words to expressly and unambiguously state so.

[51] Thus, in my view, the power under s. 54 of the Land Ordinance (Sabah Cap. 68) to "add or substitute such terms and conditions as he may think fit" has to be construed as fairly and reasonably confined, related and connected to the use of the land which is the subject matter the section is dealing with and not the duration of the estate in the leasehold tenure of the land.

Town And Country Planning Ordinance (Sabah Cap. 141)

[52] Are there any provisions in the Town and Country Planning Ordinance (Sabah Cap. 141) empowering the defendants and the authorities concerned to impose terms and conditions to reduce the duration of the estate of a leasehold for any land while granting permission for land development applied for by any owners of the land?

[53] As the owner of the land under the subdivided titles, the plaintiff is entitled to the benefit of permission to develop his land. However, under s. 28B of the Town and Country Planning Ordinance (Sabah Cap. 141), it is necessary for the plaintiff to apply for planning permission in respect of such intended development on his land in accordance with s. 28C to s. 28D of the Town and Country Planning Ordinance (Sabah Cap. 141).

[54] Under s. 4A of the Town and Country Planning Ordinance (Sabah Cap. 41), every Local Authority such as Dewan Bandaraya Kota Kinabalu is the local planning authority for its area. It is the function of the Local Authority as a local planning authority to regulate, control and plan the development of all lands and building within its area. (see s. 4B(1)(a) of the Town and Country Planning Ordinance (Sabah Cap. 141).

[55] By ss. 6(1)(b) and (c) of the Town and Country Planning Ordinance (Sabah Cap. 141), a Local Authority may by resolution, adopts with or without modifications, a draft scheme proposed by all or any of the owner of any such land or where any person makes any application to develop any land within the jurisdiction of such Local Authority, requires such person to prepare a draft scheme for such land and all land contiguous to such land in respect of which such person is the owner or has any interest whatsoever.

[56] After consideration of all objections, the Local Authority has to submit the draft of the scheme with or without amendments to the State Planning Council (see ss. 7 and 8 of the Town and Country Planning Ordinance (Sabah Cap. 141).

[57] Under s. 9 of the Town and Country Planning Ordinance (Sabah Cap. 141), the State Planning Council may adopts, with or without variations a draft scheme submitted to it by a Local Authority or may refer it back to such Local Authority for further information or consideration.

[58] When the Council adopted a draft scheme, it would then be required to be submitted to the Yang di-Pertua Negeri (see s. 10(1) of the Town and Country Planning Ordinance (Sabah Cap. 141).

[59] When the Yang di-Pertua Negeri approves a draft scheme, such approval shall be signified on such scheme and forthwith deposits it in the office of the Director of State Town and Regional Planning Department. Notice of such approval shall be published in the *Gazette* and the approved scheme shall have full force and takes effect as from the date of such notification (see s. 10(5) and (6) of the Town and Country Planning Ordinance (Sabah Cap. 141).

[60] By s. 11(1) of the Town and Country Planning Ordinance (Sabah Cap. 141), a copy of every approved scheme certified by the Director of State Town and Regional Planning Department shall be deposited at the office of the Director of Lands and Surveys and at the District Land Office and thereupon the Director of Lands and Surveys or the Assistant Collector of Land Revenue, as the case may be, shall makes on the documents of title to the lands affected by any such scheme or in the registers of title an endorsement to the effect that such land is subject to the conditions of such approved scheme.

[61] Under s. 11(2) of the Town and Country Planning Ordinance (Sabah Cap. 141), the Director of Lands and Surveys or the Assistant Collector of Land Revenue may, if he shall think fit, by notice, requires any person in possession of any document of title or copy thereof to deliver the same to him for similar endorsement, and such person shall be legally bound to deliver the same within 28 days from the date of service of such notice.

[62] The long title of the Town and Country Planning Ordinance (Sabah Cap. 141) introduced that Ordinance as "To make provision for the orderly and progressive development of land, towns and other areas whether urban or rural, to preserve and improve the amenities thereof and for other matters connected therewith."

[63] Upon perusal of the provisions of the Town and Country Planning Ordinance (Sabah Cap. 141), the matters that the relevant authorities have to consider the terms and conditions that may be imposed for granting permission for any scheme for development on the land concerning the use of the land, such as the way the land is to be physically used and to the things to be done physically on the land and not the duration of the estate of the leasehold tenure of the land on which the development was proposed to be carried out.

Whether The Defendants Have The Power To Impose The Condition That Leasehold Tenure For The Further Subdivided Titles To Be Issued Be Reduced From 999 Years To 99 Years

[64] Though the decision of the Federal Court in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* (*supra*) was based on the provisions of the National Land Code, I find the principle of law propounded by the Federal Court applies in this case. There are similarities in situations and the applicable statutory provisions.

[65] In *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd,* upon application by the respondent landowner who held the land in perpetuity, for permission for subdivision of the land and conversion of its use for building a hotel thereon, the Land Executive Committee and the Director of Lands and Mines of the Federal Territory imposed a condition for giving permission that on surrendering the land, the respondent landowner was to receive back in respect of part of the land not a title in perpetuity but a lease of only 99 years. The Federal Court held that the appellant has no power to impose the condition requiring the respondent to give up its freehold title and to receive in exchange, a 99 year lease and such condition imposed to be *ultra vires*. Before the Federal Court, the appellant relied on s. 124(5) the National Land Code then applicable and contended that the Land Executive Committee was empowered to impose the said condition, which the section provided that:

> 124(5) Any direction given by the State Authority under this section may be made conditional upon all or any of the following matters:
>
> (a) the payment of a further premium;
>
> ...
>
> (b) the reservation of a new rent;
>
> (c) compliance with **such other requirements, as the State Authority may think fit.** (emphasis added)

Suffian LP stated at p. 145 (MLJ) that: A

> With respect I do not agree. If the Committee is right, it would mean that it can unreasonably impose a condition that is irrelevant to the permitted development, such as, to take an absurd example, that the applicant should wear a beard for the rest of his life or that he should fly once round the moon. In my judgment, *the Committee must act reasonably and may only impose conditions relevant to the permitted development and does not have the drastic right to make the applicant give up title in perpetuity and receive in place of it only a 99-year lease.* (emphasis added) B

Suffian LP held further at p. 146 (MLJ) that: C

> English cases are of course decisions on the peculiar words used in the Town and Country Planning Act, whereas here we are concerned with the peculiar words used in the National Land Code, but nevertheless I am of the opinion that English cases afford principles that may be followed here. What are these principles? They are:
>
> 1. The approving authority does not have an uncontrolled discretion to impose whatever conditions it likes. D
> 2. The conditions, to be valid, must fairly and reasonably relate to the permitted development.
> 3. The approving authority must act reasonably and planning conditions must be reasonable. E
> 4. The approving authority is not at liberty to use its power for an ulterior object, however desirable that object may seem to it in the public interest.
>
> Applying these principles to the present case, it is plain, in my judgment, that the Committee does not have the power it claims to have. *The condition which the applicant objected to does not relate to the permitted development, is unreasonable, and is used for an ulterior object, the object being to bring developed land into line with newly alienated land as to which, we are told, since the war only leases, not titles in perpetuity, are granted.* However desirable this object may seem to the Committee, it has no power under the law to achieve it in the way used here. (emphasis added) F G

Raja Azlan Shah AG CJ held in that case at p. 148 (MLJ) that:

> In my opinion, the present case falls to be decided on well established principles and they are to be found in the cases decided under the (U.K.) Town and Country Planning Acts. It is unfortunate that neither in the court below nor in this court has reference been made to any of them. *The Acts empower planning authorities to refuse permission or to grant permission unconditionally or to impose such conditions "as they think fit". On principle and authority, the discretionary power to impose such conditions "as they think fit" is not an uncontrolled discretion to impose whatever conditions they like.* In exercising their discretion, the planning authorities must, to paraphrase the words of H I

Lord Greene MR in *Associated Provincial Picture Houses, Ltd v. Wednesbury Corpn* [1947] 2 All ER 685, have regard to all relevant considerations and disregard all improper considerations, and they must produce a result which does not offend against common sense; or to repeat Lord Denning MR's words in *Pyx Granite Co Ltd v. Ministry of Housing and Local Government* [1958] 1 All ER 625, approved in *Fawcett Properties Ltd v. Buckingham County Council* [1960] 3 All ER 503 *the conditions to be valid must fairly and reasonably relate to the permitted development.* The *dictum* of Lord Denning MR has been frequently quoted and followed in these matters. See *R v. Hillingdon Council, Ex parte Royco Homes Ltd* [1974] QB 720 Lord Denning said (page 572):

> The principles to be applied are not, I think, in doubt. Although *the planning authorities are given very wide powers to impose 'such conditions as they think fit',* nevertheless the law says that those conditions, to be valid, *must fairly and reasonably relate to the permitted development.* The planning authority are not at liberty to use these powers for an ulterior object, however desirable that object may seem to them to be in the public interest.

Applying the principles stated above, what is the effect of the condition under consideration? I read the affidavit of the Chairman, Land Executive Committee as claiming an unfettered discretion to grant or reject any application under section 124 or impose such conditions or other requirements as the Committee think fit. I cannot subscribe to this proposition for a moment. Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* (*ante*) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. *Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.* The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. *I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place*", (*per Danckwerts LJ in Bradbury v. London Borough of Enfield [1967] 3 All ER 434 442.*)

The Land Executive Committee is a creature of statute, and therefore possesses only such power as may have been conferred on it by Parliament. Therefore when a power vested in it is exceeded, any act done in excess of the power is invalid as being ultra vires. If authority is needed for what may be considered as axiomatic, I need only refer to the cases of *Chertsey UDC v. Mixnam's Properties, Ltd* [1964] 2 All ER 627 and *Hall & Co Ltd v. Shoreham-by-Sea UDC* [1964] 1

> WLR 240. In the former case, a statute required the occupier of land to obtain a licence before he used his land as a caravan site, and in granting such a licence, the authority were empowered to impose such conditions "as the authority may think necessary or desirable to impose", it was held that these conditions must be confined within the general purpose of the Act, and in so far as they exceeded this, they were void. In the latter case, Willmer LJ cited the well known judgment of Lord Greene MR in Associated Provincial Picture Houses (*ante*) which has several times been approved in the House of Lords, that it is in excess of power to "come to a conclusion so unreasonable that no reasonable authority could ever have come to it", and he held that the condition to be "utterly unreasonable and such as Parliament cannot possibly have intended".
>
> For the above reasons, it does not seem to me that the decision of the Land Executive Committee can possibly be regarded as reasonable or as anything other than *ultra vires*. It had exceeded its power and the decision was therefore unlawful as being an unreasonable exercise of power not related to the permitted development and for an ulterior purpose that no reasonable authority, properly directing itself, could have arrived at it. The Committee, like a trustee, holds power on trust and acts validly only when acting reasonably. In such circumstances I would follow the *dictum* of Hodson LJ in *Pyx Granite* (*ante*, page 579), to the effect that, if a condition is held to be *ultra vires*, it nullified the whole planning permission. For it must be assumed that without the impugned condition the permission would never have been granted. (emphasis added)

See also *Leo Leslie Armstrong (Sebagai Presiden Dan Pemegang Jawatan The Young Men's Christian Association Of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (Yang Dahulunya Di Pegang Oleh Majlis Mesyuarat Kerajaan Negeri Selangor)* [2015] 2 CLJ 10; [2015] 1 MLJ 255 (CA); *Ngo Ong Chung & Ors v. Pengarah Tanah Dan Galian Perak Darul Ridzuan* [2013] 1 LNS 146; [2013] 10 MLJ 879 (HC); *Pyx Granite Co Ltd v. Ministry of Housing and Local Government* [1958] 1 All ER 625; *Fawcett Properties Ltd v. Buckingham County Council* [1960] 3 All ER 50; *Chertsey UDC v. Mixnam's Properties, Ltd* [1964] 2 All ER 627; *Hall & Co Ltd v. Shoreham-by-Sea UDC* [1964] 1 All ER 1.

[66] In the premises, I find and hold that the condition imposed by the first defendant that leasehold tenure for the further subdivided titles to be issued be reduced from 999 years to 99 years is not connected or related to use of land in town planning and cannot fairly be said to be related to the permitted land development under the laws in the State of Sabah and therefore beyond the power of the defendants to impose.

[67] In the instant case, I noted that the condition for the leasehold tenure to be reduced from 999 years to 99 years in respect of the issuance of the further subdivided titles to the plaintiff was imposed by the first defendant as term proposed in an offer for giving permission to develop the land which the plaintiff had accepted. The question is whether such condition or term was rendered valid and binding on the plaintiff by law of the contract.

[68] As Raja Azlan Shah AG CJ held in *Pengarah Tanah Dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd,* Land Executive Committee is a creature of statute, and therefore possesses only such power as may have been conferred on it by Parliament, similarly, the position and office of the defendants are also created by the Land Ordinance (Sabah Cap. 68). They have only so much power as they were conferred by the State Legislature by statutes.

[69] I could not find any statutory provisions which gave them the power or capacity to impose such condition in the form and by way of term or condition proposed or offered to contract with the defendant in an application for permission by the plaintiff for development of their land concerned.

[70] I do not think the fact that such term and condition was imposed in the form of term or condition proposed or offered to contract by the first defendant and accepted by the plaintiff, changed the position and gave the power to the defendants to impose such term and condition which was beyond the power and capacity of the defendants to impose at the first place.

[71] I am bound by the ruling of Court of Appeal in *Leo Leslie Armstrong (Sebagai Presiden Dan Pemegang Jawatan The Young Men's Christian Association Of Kuala Lumpur) (Persatuan Pemuda Kristian Kuala Lumpur) v. Jawatankuasa Kerja Tanah Wilayah Persekutuan Kuala Lumpur (Yang Dahulunya Di Pegang Oleh Majlis Mesyuarat Kerajaan Negeri Selangor)* (*supra*) in this respect where Abdul Aziz Rahim JCA held at pp. 26 to 27 (CLJ); p. 274 (MLJ) that:

> [34] Thirdly, with regard to the learned senior federal counsel's argument that the appellant in this appeal had indicated their consent to the terms imposed by the respondent in approving the appellant's application for subdivision, thereby distinguishing the facts in this appeal from the facts in *Sri Lempah* where the applicant had not consented to the change from title in perpetuity to leasehold, we are of the view that there is no merit in this argument. The learned Suffian LP had said at p 145 of the report that in an application for change of conditions of land use etc under s. 124(1) of the NLC, the question of consent does not arise as consent is implicit in the application. Moreover, we agree with the submission by learned counsel for the appellant that on the authority of *Federal Hotel Sdn Bhd v. National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175, which states that:

> ... no consent or acquiescence can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction, ...
>
> The issue of consent or acquiescence is irrelevant.

[72] For the reasons above, I therefore hold that the condition imposed by the defendant that leasehold tenure for the further subdivided titles to be issued be reduced from 999 years to 99 years in the plaintiff's application for permission for the development of the land concerned to be *ultra vires*, unlawful, null and void.

Whether The Plaintiff's Action Herein Is Time-Barred By s. 2(a) Of The Public Authorities Protection Act 1948 (PAPA)

[73] Section 2 of PAPA provides that:

> 2 Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person **for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority** or in respect of any alleged neglect or default **in the execution of any such written law, duty or authority** the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof.

[74] In order to afford the defendants protection under s. 2(a) of PAPA, the defendants have to bring themselves within the scope of the provision therein providing them with the protection, that is the action or suit must be against any person:

> (i) for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority; or
>
> (ii) for neglect or default in the execution of any such written law, duty or authority

[75] In *Lee Hock Ning v. Government Of Malaysia* [1972] 1 LNS 66; [1972] 2 MLJ 12, the Federal Court held that non-payment of monies due under building contract by the Government was not in pursuance of a public duty and could not have come within the similar provisions of s. 2 of the Public Authorities Protection Ordinance 1948. It is immaterial that the building contract may have been entered into for the purpose of performing a statutory duty.

Ong CJ stated at p. 14 (MLJ) that:

> When the Government, or any other public authority, is sued for the price of goods sold and delivered or for work and labour done, I cannot see how the refusal to pay a just debt can be said to be an act or default in pursuance or execution of a public duty. What had the appellant done to justify the Government's refusal to pay him the contract price? Nothing, but for the counterclaim which failed. **The non-payment, therefore, was not in pursuance of a public duty: consequently it could not have come within the provisions of section 2.** As Lord Tucker said in *Firestone Tyre & Rubber Co (SS) Ltd v. Singapore Harbour Board* [1952] MLJ 145 147; [1952] AC 452 464:
>
> > It is essential to the protection afforded by the statute that the act or default in question **should be in the discharge of a public duty or the exercise of a public authority.** This assumes that there are duties and authorities which are not public. (See per Lord Buckmaster in the *Bradford Corporation* case.)
>
> In *Bradford Corporation v. Myers* [1916] 1 AC 242 262 Lord Shaw of Dunfermline said:
>
> > It is not enough that the neglect occurs in the doing of a thing which is authorized by statute, but the thing done is not every or anything done but **must be something in the execution of a public duty or authority, and it is only neglect in the execution of any such duty or authority that is covered by the statute.** This restriction appears to me to be vital. The Act seems to say: there are many things which a public authority, clothed, say, with statutory power, may do, which the limitation will not cover; but when the act or neglect had reference to the execution of their public duty or authority – something founded truly on their statutory powers or their public position – to that, and that only, will the limitation apply. I gather that this is the view taken by my noble and learned friend on the woolsack, and while I concur in his views as a whole, I express my pointed agreement with him on this head. (emphasis added)

[76] In *Ban Guan Hin Realty Sdn Bhd v. Sunny Yap Chiok Sai & Ors* [1987] 1 LNS 144; [1989] 1 MLJ 131, it was held that the claim against the government officer in the customs department for fraudulent usage of money paid to the customs authorities cannot be said to be an act done in pursuance or execution or intended execution of any written law, of any public duty or authority or in respect of any alleged neglect or default in the execution thereof to avail the defendants of the protection under s. 2(a) of the PAPA.

[77] In the instant case, the act complained of against the defendants is for imposing the term and condition that leasehold tenure for the further subdivided titles to be issued be reduced from 999 years to 99 years for giving permission to the plaintiff for the proposed development plan on the land concerned which the defendants have no such power to impose.

[78] The imposing of such term and condition which the defendants have no power to do so cannot be said to be such act done in pursuance of a public duty or authority. Therefore, it could not have come within the provisions of s. 2(a) of PAPA.

[79] I find in support in the case of *Ngo Ong Chung & Ors v. Pengarah Tanah Dan Galian Perak Darul Ridzuan* where the court held that s. 2(a) of the PAPA 1948 cannot avail to protect an *ultra vires* act of the public authority in reducing the tenure of land from freehold to leasehold of 99 years upon application for development of the land. I adopt the reasoning of Harmindar Singh Dhaliwal J in that case at pp. 886 to 887 (MLJ) where he stated that:

> [16] It would appear from an analysis of s. 2(a) of the PAPA 1948 itself that *protection is limited to 'any act done in pursuance or execution or intended execution of any written law or of any public duty or authority' and that the 'neglect or default' must be 'in the execution of any such written law, duty or authority'.* In other words, not every act of a public authority is entitled to protection (see also *Ban Guan Hin Realty Sdn Bhd v. Sunny Yap Chiok Sai & Ors* [1989] 1 MLJ 131; *Lee Hock Ning v. Government of Malaysia* [1972] 2 MLJ 12; *Littlewood v. George Wimpey & Co Ltd* [1953] 2 All ER 915; [1953] 1 QBD 383 at p 587; *Bradford Corp v. Myers* [1916] 1 AC 242).
>
> [17] It might be argued that everything done by a public authority ought to be regarded as being done in execution of their powers under the statute. In this regard, Lord Buckmaster LC in the *Bradford Corporation* case clarified: '… it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. *It is because the act is one which is either an act in direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority*.
>
> [18] More importantly, and this is especially relevant to the instant action, *protection is only afforded if the authority acts within their power.* In the Bradford Corporation case, Lord Atkinson referred to the judgment of Vaughan Wiiliams LJ in *Lyles v. Southend-on-Sea Corporation* [1905] 2 KB 1 where His Lordship said: 'Now, I do not think that it can have been the intention of the legislature that every act done by the corporation which was *intra vires* conferred by this order should be subject to the protection afforded by this Act'. The Act being referred to here was the Public Authorities Protection Act 1893 of the United Kingdom. Section 1(a) of the 1893 Act was later replaced by s. 21(1) of the Limitation Act 1939. That provision, in substantially the same terms, found its way in our own PAPA 1948.
>
> [19] The position that obtains from the case law is that not every act of a public authority is entitled to protection. *However, in order to get protection, an act must first be intra vires or within the power of the public authority. In the instant action, however, the defendant's action in reducing the tenure of the lands was ultra vires the NLC, without jurisdiction and a nullity. Being ultra vires and void of jurisdiction, it was invalid from its very inception. I cannot imagine an ultra vires act becoming intra vires over the course of time. It cannot be gainsaid that s 2(a) of the PAPA 1948 is intended to protect public servants acting in the execution of*

A *statutory and public duties. The intention is to protect public servants acting in accordance with the law and not outside it. In other words, it is intended to protect lawful acts and not void acts or acts which have no legal effect.*

[20] *It would also be incongruous and perhaps absurd to suggest that a person who is acting contrary to the law can at the same time be said to be acting in pursuance of any law or public duty.* In *Ban Guan Hin Sdn Bhd v. Sunny Yap*, allegations surfaced that customs officers fraudulently used funds for their own use when the same was meant for the purpose of excise duty. His Lordship VC George J (as he then was) held that such an act cannot be said to be act done in pursuance or execution or intended execution of any written law, of any public duty or authority or in respect of any alleged neglect or default in the execution thereof and accordingly protection of the Public Authorities Protection Act 1948 cannot be invoked.

(emphasis added)

[80] For the reasons as stated, the State counsel also fails in her submission that the plaintiff's action herein is time-barred by s. 2(a) of the PAPA.

D

Conclusion And Orders

[81] For the reasons as stated, I hold that the defendants have no power to impose the condition or term that leasehold tenure for the further subdivided titles to be issued be reduced from 999 years to 99 years; and the plaintiff's action herein is not time-barred by s. 2(a) of the PAPA which cannot have any application in this case.

[82] I therefore grant the order for declarations as sought for by the plaintiff in prayer (1) to (6) of the originating summons herein (encl. 1). I make no order in respect of prayer (7) of the originating summons herein (encl. 1) as I believe and expect the defendants to be law abiding and will do their duties in view of the declarations made. I order that costs of the action in the sum of RM10,000 subject to allocatur fee and including the allocatur fee to be paid by the defendants to the plaintiff.